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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 879

BARBARA J. BEAUCHAMP, GEORGANN MARTIN AND MAX TROUB,
Petitioners

VS.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION; JAMES H. NORICK, MAYOR OF THE CITY OF OKLAHOMA CITY; PATIENCE LATTING, JOHN M. SMITH, GEORGE N. STURM, NELSON E. KELLER, BILL H. BISHOP, BEN FRANKLIN, A. L. DOWELL AND ROWE COOK, MEMBERS OF THE CITY COUNCIL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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VS.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION; JAMES H. NORICK, MAYOR OF THE CITY OF OKLAHOMA CITY; PATIENCE LATTING, JOHN M. SMITH, GEORGE N. STURM, NELSON E. KELLER, BILL H. BISHOP, BEN FRANKLIN, A. L. DOWELL AND ROWE COOK, MEMBERS OF THE CITY COUNCIL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

Respondents pray denial of a Writ of Certiorari to review the judgments of the Supreme Court of the State of Oklahoma, entered in the above entitled case on October 16, 1970.

OPINION BELOW

The Opinion of the Supreme Court of the State of Oklahoma is unreported and is printed in Appendix C hereto, infra, p. A-4).

JURISDICTION

The judgments of the Supreme Court of the State of Oklahoma were entered on October 16, 1970, Appendix C, P A-5, infra. And while Petitioners seek to invoke the jurisdiction of this Court under 28 U.S. C., Section 1257 (2), (3) and Rule 19 of the Supreme Court of the United States, it is respectfully submitted that the ground for such jurisdiction does not exist in the instant case because the court below did not decide a federal question.

Respondents do not deny that Petitioners raised several federal questions involving various provisions of the United States Constitution in both the trial court and the Supreme Court below, such questions, however, were decided by neither court. Instead, the decisions below are based solely upon a determination of matters of state law.

QUESTIONS PRESENTED

1. Is the provision for challenging Bond Elections in Oklahoma a "well defined period" within the meaning of *City of Phoenix v. Emily Kolodziejski*, _____U.S._____ 26 L Ed. 2d 523, 90 S. Ct. 1990?

2. Can an individual who was neither a registered voter nor a non-property taxpayer institute and prosecute a suit contesting the constitutionality of a law which gives only property taxpayers the right to vote in elections to approve issuance of municipal bonds to be secured solely by property taxes?

3. Is it a denial of equal protection to deprive these resident Petitioners or any other resident of the entity holding a Bond Election the right to challenge the validity of such a Bond Election, whether they be registered voters or non-registered voters, property taxpayers or non-property taxpayers, or any

combination thereof, and when to register to vote in the subject election would have been a vain and futile gesture under an Oklahoma Constitutional provisions that limits the electorate to property taxpayers only?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are Title 62, Oklahoma Statutes Section 13, 12 O. S. 221 and 12 O. S. 223 and 12 O. S. (1961) 322. Appendix B. P A-3, infra. The Constitutional provisions involved are Article X, Sections 27 and 26 of the Constitution of the State of Oklahoma, Appendix A, p A-1, infra, and the U. S. Constitutional provisions of due process and equal protection, 5th and 14th Amendments.

STATEMENT

On June 9, 1970, the qualified property tax paying voters of Oklahoma City, Oklahoma, did, pursuant to provisions of Article X, Section 27 of the Oklahoma State Constitution, P A-1, infra, at a special election authorize the issuance of General Obligations Bonds in the principal amount of $19,189,800.00.

On August 18, 1970, the Attorney General of the State of Oklahoma, as ex officio Bond Commissioner did, pursuant to provisions to Title 62, Oklahoma Statues, Section 13, P A-4, infra, examine and approve the issuance of said Bonds.

On September 16, 1970, Petitioner, Max Troub, a non-property taxpayer and a non-registered voter, filed an action against the Respondent, The City of Oklahoma City, Oklahoma, seeking to restrain and enjoin said Respondent from issuing, selling or delivering the aforesaid General Obligation Bonds, for the reason that said election limited, pursuant to Article X, Section 27 of the Oklahoma State Constitution, the electorate

to only those voters who were property taxpayers, thereby denying Troub and all others similarly situated equal protection guaranteed by the Constitution of the United States.

On September 17, 1970, the Petitioner, Georgann Martin, a non-property taxpayer and a non-registered voter, was granted leave by the trial court to intervene in the above mentioned case and to adopt the petition filed therein as her own, seeking in substance the same relief as Max Troub.

Thereafter, on September 17, 1970, the last day before the bonds would become incontestable, the Petitioner, Barbara J. Beauchamp, filed her Petition (R p 90) for an injunction in the Oklahoma Supreme Court, seeking to enjoin and restrain Respondents from issuing the bonds purportedly authorized by the election of June 9, 1970.

On September 18, 1970, the Respondent, The City of Oklahoma City filed its Motion in Abatement and Demurrer to the Petition and the Petition in Intervention filed by Petitioners Martin and Troub. On September 18, 1970, the trial court, having read the briefs submitted and hearing oral arguments from all parties, sustained the Respondent's, The City of Oklahoma City, Motion in Abatement, Appendix C here, infra, P. A-5, and entered judgment in favor of said Respondent dismissing the suit on grounds that Petitioners Troub and Martin were not registered voters on the date of said election and therefore not real parties in interest, to all of which Petitioners excepted and gave oral notice of intention to appeal to the Supreme Court of the State of Oklahoma. On that same day the Petitioner, Georgann Martin, filed her appeal in the Supreme Court of the State of Oklahoma.

On September 18, 1970, the Oklahoma Supreme Court, after hearing oral arguments of the parties, took under advisement the question of whether or not to accept original jurisdiction of Petitioner Beauchamp's suit and whether or not

to consolidate the same with the appeal suit of Petitioner Martin. All briefs in support of contentions were filed by September 24, 1970. On September 23, 1970, Petitioner Troub filed his appeal in the Supreme Court of the State of Oklahoma.

ARGUMENT

The Issues Invloved Herein Do Not Warrant Review By This Court on Certiorari

The decision below that the Petitioners Martin and Troub, not being registered voters, had no standing to maintain an action challenging the instant bond election clearly does not warrant review by this court in view of the additional determination of the court below that such election was not subject to challenge in an action properly brought by Petitioner Beauchamp. Consequently, the only substantial question presented in the instant case is whether Oklahoma does or does not have a well-defined period in which to protest bond elections. The effect of a decision of this latter question by the Court would be limited to the determination of the validity or invalidity of a relatively small number of unsold issues of general obligation bonds authorized at elections held in Oklahoma prior to this Court's decision in *City of Phoenix v. Kolodziejski*, supra. Manifestly, such an issue is too narrow to warrant review by this court on certiorari.

I.

The Decisions Below Are Clearly Correct

As shown by the analyses and authorities set forth in the opinions below, Appendix C, p A-4, infra, the Oklahoma

Supreme Court was clearly correct in its decisions:

1.) that one who is not a registered voter has no standing to bring an action challenging a bond election and, consequently, cannot maintain such an action as representative of registered voters who were taxpayers, and

2.) that Oklahoma has no well-defined period for bringing challenges to bond elections.

In reaching its determination that Oklahoma has no well-defined period for bringing challenges to bond elections, the court below examined its prior decisions wherein such challenges had been allowed prior to the commencement of the thirty (30) day period specified in 62 O. S. 1961, Section 13. This determination is equally supported by prior holdings of the Oklahoma Supreme Court that the expiration of the period specified in Section 13, supra, will not bar the challenge of a bond issue on constitutional grounds. *Eaton v. St. Louis-San Francisco Ry. Co.*, 122 Okl. 143, 251 Pac. 1032, and *Smallow Battery Co v. Payne*, 123 Okl. 137, 252 Pac. 423.

II.

There Is No Conflict of Decisions.

The decisions below are not in conflict with the Court's decision in *City of Phoenix v. Kolodziejski*, supra, but, on the contrary are entirely consistent with the principles announced therein.

In its decision in **City of Phoenix**, supra, this Court did not hold, as suggested by Petitioners, that the 14th Amendment to the United States Constitution requires that bond elections in which only property taxpayers were permitted to vote must be subject to challenge. On the contrary, in that portion of the

opinion limiting the retroactive effect of its decision, this Court announced that in cases of states having no well-defined period for bringing such challenges, all persons, whether registered voters or not, would be precluded from protesting constitutionally defective elections, the reason for such foreclosure of challenges being the policy determination that "it would be unjustifiably disruptive to give our decision full retroactive effect." Thus, no alleged Constitutional rights of Petitioners Martin and Troub would have been violated if the court below had declined to rule on the validity of Oklahoma City's bond election for the reason that Oklahoma has no well-defined period for the bringing of challenges to bond elections.

The rights, if any, of Martin and Troub to challenge the bond election at issue were not foreclosed by the court below; these rights were foreclosed by Petitioners themselves, in their failure to register to vote so as to place themselves in the posture of those having standing to bring an action at law to contest an election. Petitioners assertion that it would have been a futile act for them to have registered to vote in the bond election at issue since, as non-taxpayers, they would not have been permitted to vote is an exercise in and sophistry, especially in view of the fact that Proposition No. 1 submitted at the June 9, 1970, Oklahoma City, bond election was a question on which, under Section 26, Article X, Oklahoma Constitution, all registered voters, including those who pay no property taxes, were permitted to vote. (R p 90, and Appendix A, p A-1, infra.)

III

There Is No Important Question of Federal Law.

The decisions below do not turn on the court's interpretation of any provision of the United States Constitution, but rather are based exclusively upon that court's interpretation and

construction of statutes of the state of which the court below is the highest court.

The interpretation which the court below gives to 62 O. S. 1961, Section 13, is that this statute provides for no well-defined period for bringing challenges to bond elections in Oklahoma. In accordance with this Court's prior decisions, that interpretation will be accepted as conclusive in the instant action. In *Camp v. Board of Public Instruction*, 268 U. S. 278, 82 S. Ct. 275, 7 L. Ed. 2d. 285, this Court held:

> "In the present case the Florida court adhered to this construction of the statute, characterizing what had been said in Diez as a ruling that 'the element of scienter was implicit in each of the requirements of the statute.' 125 So 2d. at 557. We accept without question this view of the statute's meaning, as of course we must. This authoritative interpretation by the Florida Supreme Court 'puts these words in the statute as definitely as if it had been so amended by the legislature.' *Winters v. New York*, 333 U. S. 507, 514, 92 L Ed 840, 849, 68 S. Ct. 665. See *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, at 688, 3 L Ed. 2d 1512, 1516, 79 S. Ct. 1362; *Albertson v. Millard*, 346 U.S. 242, 97 L Ed 980, 73 S. Ct. 600; *United States v. Burnison*, 339 U.S. 87, 93 L Ed 675, 70 S. Ct. 503; *Aero Mayflower Transit Co. v. Railroad Comrs.* 332 U.S. 495, 92 L Ed 99, 68 S. Ct. 167." (368 U.S. at 285).

Likewise, this Court will deem itself to be precluded from reviewing decisions of a state's highest court on matters of state procedure: *Hagon John v. Lewis Paullin*, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381. In this connection this Court, in *Greenough v. Tax Assessors*, 331 U.S. 486, 67 S. Ct. 1400, 91 L. Ed. 1621 determined,

> "... All questions of state procedure and of the

applicability of the state statute to the resident trustees in the circumstances of this case were foreclosed by the rulings of the Supreme Court of Rhode Island." (331 U.S. at 488)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October, 1970

APPENDIX A

CONSTITUTIONAL PROVISION

Art. 10, Oklahoma Constitution, Sec. 27.

Indebtedness for purchase, construction or repair of public utilities.

"Any incorporated city or town in this State may, by a majority of the qualified property tax paying voters of such city or town, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in section twenty-six, for the purpose of purchasing or constructing public utilities, or for repairing the same, to be owned exclusively by such city: Provided, that any such city or town incurring any such indebtedness requiring the assent of the voters as aforesaid, shall have the power to provide for, and before or at the time of incurring such indebtedness, shall provide for the collection of an annual tax in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same."

Art. 10, Oklahoma Constitution, Sec. 26.

Indebtedness of political subdivision — Assent of voters — Limitation of amount — Annual tax

"Except as herein otherwise provided, no county, city, town, township, school district, or other political corporation, or subdivision of the State, shall be allowed to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, with the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five

per centum (5%) of the valuation of the taxable property therein, to be ascertained from the last assessment for State and county purposes previous to the incurring of such indebtedness: Provided, that if a school district has an absolute need therefor, such district may, with the assent of three-fifths of the voters thereof voting at an election to be held for that purpose, incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding five per centum (5%) but not exceeding ten per centum (10%) of the valuation of the taxable property therein, to be ascertained from the last assessment for State and county purposes previous to the incurring of such indebtedness, for the purpose of acquiring or improving school sites, constructing, repairing, remodeling or equipping buildings, or acquiring school furniture, fixtures or equipment; and such assent to such indebtedness shall be deemed to be a sufficient showing of such absolute need, unless otherwise provided by law. Provided, further, that any county, city, town, school district, or other political corporation, or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five (25) years from the time of contracting the same, and provided further that nothing in this Section shall prevent any school district from contracting with certificated personnel for periods extending one (1) year beyond the current fiscal year, under such conditions and limitations as shall be prescribed by law."

APPENDIX B

OKLAHOMA STATUTES

12 O. S. Sec. 221.

Plaintiff to be real party in interest.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this article but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract."

12 O.S. Sec. 233.

One or more parties suing or defending for benefit of all.

"When the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

12 O.S. (1961) Sec. 322.

Pleas in abatement—Raising of defense by motion or answer.

"Where a defense in abatement does not appear on the face of the petition, it may be raised either by motion or in the answer. When the defense is raised by motion, the motion shall state the relevant facts, and it shall be joined with the defendant's objections to defects which appear on the face of the petition, whether raised by motion or demurrer. When the defense is raised in the answer, the court may try the issue in abatement prior to the trial on the merits. When a defense in abatement

is raised by motion, it is unnecessary for the defendant to raise it in the answer in order to preserve his right to have the ruling reviewed on appeal."

62 O. S. Sec. 13.

Duties of Bond Commissioner—Certificate—Bond incontestable after 30 days.

"It shall be the duty of the Bond Commissioner to prepare uniform forms and prescribe a method of procedure under the laws of the State in all cases where it is desired to issue public securities or bonds in any county, township, municipality or political or other sub-divisions thereof of the State of Oklahoma; and it shall be the further duty of said Bond Commissioner to examine into and pass upon any security so issued, and such security, when declared by the Certificate of said Bond Commissioner to be issued in accordance with the forms of procedure so provided shall be incontestable in any court in the State of Oklahoma unless suit thereon shall be brought in a court having jurisdiction of the same within thirty days from the date of the approval thereof by the Bond Commissioner."

APPENDIX C.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

MAX TROUB,
Plaintiff,
GEORGANN MARTIN,
Intervenor,

NO. CD-70-696

vs

THE CITY OF OKLAHOMA CITY,
A Municipal Corporation,
Defendant.

JOURNAL ENTRY SUSTAINING MOTION IN ABATEMENT

On this 18th day of September, 1970, came on for hearing the Motion in Abatement of the Defendant, The City of Oklahoma City, the parties being present by their attorneys, William H. Brogden, for plaintiff, David M. Harbour, for intervenor, and Roy H. Semtner, Municipal Counselor and Walter M. Powell, Assistant Municipal Counselor, attorneys for defendant; and the Court having heard arguments of counsel, and being fully advised, entered judgment in accordance with terms of the following minute:

"Ent. Comes on for hearing on motion in abatement. Motion sustained and case dismissed; Plaintiffs give oral notice of intention to appeal in open court. Defendant gave oral notice of intent to file motion to advance appeal in Supreme Court and present same there at 3:00 P.M. today. Parr"

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Judgment be entered in accordance with the aforesaid Minute.

(s) Jack R. Parr
Judge of the District Court

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Barbara J. Beauchamp

Plaintiff

vs

NO. 44475

City of Oklahoma City, a Municipal Corporation; James H. Norick, Mayor of the City of Oklahoma City; Patience Latting, John M. Smith, George N. Sturm, Nelson E. Keller, Bill H. Bishop, Ben Franklin, A. L. Dowell and Rowe Cook, Members of the City Council

Defendants

SYLLABUS

1. Oklahoma does not have a well-defined period for bringing challenges to general obligation bond elections within the meaning of *City of Phoenix v. Kolodziejski*, _____U. S._____, 90 S. Ct. 1990, 26 L. Ed. 2d 523.

2. The general obligation bond election held by the City of Oklahoma City, Oklahoma, on June 9, 1970, having not been challenged prior to the date of the decision in *City of Phoenix v. Kolodziejski* _____U. S._____, 90 S. Ct. 1990, 26 L. Ed. 2d 523, is not open to challenge on the basis of the ruling in such decision.

* * *

ORIGINAL ACTION FOR WRIT OF INJUNCTION

* * *

WRIT DENIED

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IRWIN, C. J.:

This is an original action filed in this Court on September 17, 1970, in which the plaintiff contends that the portion of Art. 10, § 27, of the Oklahoma Constitution, requiring persons voting at the election therein provided, to be "qualified property tax paying voters," violates the equal protection clause in the Fourteenth Amendment to the United States Constitution.

We accept original jurisdiction of the action because of the public importance of the matter and the need for an early determination of the involved question.

There appears to be no dispute as to the facts. On June 9, 1970, the City, pursuant to Art. 10, § 27, of the Oklahoma constitution, held a special election in which eleven propositions were submitted to the registered qualified tax paying voters of the City as to whether the City should incur indebtedness by issuing its general obligation bonds in amounts totaling more than $69,000,000.00, to provide funds for the several purposes of purchasing and/or constructing public improvements consisting of sanitary sewers, storm sewers, water works systems, solid-waste disposal system, municipal maintenance and service facility, fire stations and equipment, traffic control, airports, park and recreational facilities, municipal

libraries and public transportation system. Included in the election was the further matter of levying and collecting an annual tax upon all taxable property in the City to pay the interest and principal of the bonds as they became serially due.

The propositions received the required majority vote in favor thereof. Plaintiff was not allowed to vote in this election because she was not a property taxpayer.

The City then commenced proceedings to sell more than $19,000,000.00 of said bonds. The Attorney General of Oklahoma, as ex-officio Bond Commissioner of the State of Oklahoma, approved the bonds on August 18, 1970. Title 62 O. S. 1961, §13, provides that bonds of a municipality shall be incontestable unless suit is brought thereon within thirty days from the date of such approval.

Plaintiff then filed this action against the City and the members of the City Council on September 17, 1970, for herself and all others in her class. She alleges the facts above narrated. The parties stipulate that plaintiff is not a real or personal property taxpayer but is an otherwise qualified and registered voter in the City of Oklahoma City. Plaintiff alleges that only qualified property tax paying voters were permitted to vote at the election, and thereby she was excluded from voting. She prays that the defendants be enjoined from issuing the bonds, on the ground that Art. 10, §27, violates the Equal Protection Clause of the Fourteenth Amendment.

Our Constitution, Art. 10, §26, provides that no city shall become indebted in an amount exceeding, in one year, the income and revenue provided for such year, without the consent of three-fifths of the voters thereof and even then the indebtedness could not exceed, including existing indebtedness, 5% of the valuation of the taxable property therein.

Art. 10, §27, of the Constitution allows a city, by a majority of the "qualified property tax paying voters", to become indebted "in a larger amount than that specified in section twenty-six" for the purpose of purchasing or constructing public utilities, or for repairing the same, and provides that the city shall collect an annual tax sufficient to pay the indebtedness. Our construction of Art. 10, §27, supra, was

recently re-considered in *Settle v. City of Muskogee, Okl.* 462 P. 2d 642, promulgated in December, 1969. In Settle, we also discussed our understanding of the principles announced in *Kramer v. Union Free School*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969), and *Cipriano v. City of Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L.Ed. 2d 647 (1969). We held, for the reasons stated in the Settle case, that §27 of Art. 10 did not conflict with these principles and that §27 did not violate the Equal Protection Clause of the Fourteenth Amendment. This Court has for many years been committed to the rule in the Settle case that only taxpayers owning real or personal property, as provided in Art. 10, §27, may vote for incurring indebtedness for public improvements enumerated therein. *Henry v. Oklahoma City*, 188 Okl. 308, 108 P. 2d 448.

After our decision in the Settle case, supra, and subsequent to the election in the instant case (June 9, 1970), the United States Supreme Court (June 23, 1970) decided *City of Phoenix v. Kolodziejski*, _____ U. S. _____, 90 S. Ct. 1990, 26 L. Ed. 2d 523. In Phoenix the Supreme Court of the United States held that the Arizona Consitution and statutes, as applied to exclude nonproperty owners from voting in elections to approve issuance of general obligation bonds, violated the equal protection clause of the U. S. Constitution. However, the Supreme Court recognized that it would be unjustifiably disruptive to give its decision full retroactive effect and placed a limitation thereon. The language limiting the retroactive effect of the decision is set forth in a dismembered form for clarification:

> "* * *We, therefore adopt a rule similar to that employed with respect to the applicability of the Cipriano decision: Our decision in this case will apply only to authorizations for general obligation bonds which are not final as of June 23, 1970, the date of this decision.
>
> (a) "In the case of States authorizing challenge to bond elections within a definite period, all elections held prior to the date of

this decision will not be affected by this decision unless a challenge on the grounds sustained by this decision has been or is brought within the period specified by state law.

(b) "In the case of States, including apparently Arizona, that do not have a well-defined period for bringing challenges to bond elections, all elections held prior to the date of this decision that have not yet been challenged on the grounds sustained in this decision will not be open to challenge on the basis of our ruling in this case.* * *"

The parties have submitted this case to our Court for determination of a single issue and that is: Does Oklahoma have a well-defined period for bringing challenges to general bond elections within the meaning of City of Phoenix?

Plaintiff contends that Oklahoma has a definite period for challenging general bond elections; that paragraph (a), is applicable; and that this Court should enjoin the issuance of the bonds.

Defendants contend that Oklahoma does not have a well-defined period for bringing challenges to general bond elections; that paragraph (b) is applicable; and that this Court should not enjoin the issuance of the bonds.

The election on the bonds under consideration was held on June 9, 1970, and the decision in Phoenix was rendered on June 23, 1970. The bonds in question were approved by the Bond Commissioner of Oklahoma on August 18, 1970, and thereafter and within the time allowed by 62 O. S. 1961, § 13, a challenge to the approval of the bonds was brought on the grounds sustained in Phoenix.

The only statutory enactment that is pertinent to the issue involved is 62 O. S. 1961, § 13, which provides:

"It shall be the duty of the Bond Commissioner to prepare uniform forms and prescribe a method of

procedure under the laws of the State in all cases where it is desired to issue public securities or bonds in any county, township, municipality or political or other sub-divisions thereof of the State of Oklahoma; and it shall be the further duty of said Bond Commissioner to examine into and pass upon any security as issued, and such security, when declared by the certificate of said Bond Commissioner to be issued in accordance with the forms of procedure so provided shall be incontestable in any court in the State of Oklahoma unless suit thereon shall be brought in a court having jurisdiction of the same within thirty days from the date of the approval thereof by the Bond Commissioner."

As a practical matter the Bond Commissioner does not perform his duties under the above enactment until a general bond election has been held and the proceedings leading to the sale of the bonds have been completed. In many instances, the Bond Commissioner is requested to consider the legality of only a part or a series of the bonds that have been approved at a bond election. Thereafter, he may be requested to consider another part or another series of the bonds that a municipality desires to sell that had been approved at the previous election. As an example: General obligation bonds are approved at an election held in February, 1969. On June 1, 1969, the Bond Commissioner approves the issuance of a certain series of the bonds approved at the February 1969, election. Thirty days after the Bond Commissioner has acted, his determination is no longer open to challenge. Thereafter, the Bond Commissioner approves another series of bonds which were voted upon and approved at the February, 1969, bond election. Thirty days after the Bond Commissioner has acted, his determination is no longer open to challenge.

The Bond Commissioner is not required to perform his duties or act under § 13, supra, within a specified time, but thirty days after he has acted his determination is no longer open to challenge. It is to be noted that the above enactment is directed to the Bond Commissioner's determination as to the legality of the bonds to be issued, but is silent concerning a

challenge to a general bond election or the period of time within which a challenge to the election may be brought. This Court has recognized that an action may be brought to challenge the validity of a bond election prior to the Bond Commissioner's official actions pursuant to §13, supra, notwithstanding the fact there is no specific statutory authority authorizing such action.

In *Munger v. Town of Watonga*, 106 Okl. 76, 233 P. 211, an action was filed to enjoin the issuance and selling of certain municipal bonds. At issue was the conduct of the election. The trial court sustained a demurrer to plaintiff's petition and on appeal this Court reversed with directions to vacate the judgment and overrule the dumurrer to the petition. Although §13, supra, was not discussed, Munger is authority for challenging the conduct of an election prior to the action by the Bond Commissioner.

In *Gilliland v. City of Clinton*, 131 Okl. 186, 268 P. 254, an action was filed in the trial court to enjoin the sale of bonds on the grounds of illegal voting. A temporary injunction was issued and a motion to dissolve the temporary injunction was filed. On hearing the motion, the temporary injunction was dissolved and an appeal was perfected. We affirmed the judgment of the trial court on the ground that we did not think, under the record, that the election was void. Although §13, supra, was not discussed, this case is authority for challenging the conduct of an election prior to the action by the Bond Commissioner.

In *White v. Pottawatomie County*, 199 Okl. 103, 184 P. 2d 446 (1947), an action was filed against the Board of County Commissioners, the County Treasurer and the Attorney General to enjoin the issuance of bonds prior to the time the Attorney General, acting as the Bond Commissioner had performed his duties pursuant to §13, supra. In that case we held:

> "The question whether the election at which bonds were voted is legal or illegal is a matter properly to be considered by the Commissioner in the performance of his duty.
>
> "Subsequent to the holding of an election at

which bonds are voted and previous to the performance by the Bond Commissioner of the duties prescribed by law with reference thereto the citizen taxpayer is without capacity or authority to sue in the courts to have such bonds declared illegal because of the illegality of such election."

Although the Pottawatomie County case and §13, supra, were not considered or discussed in *Tettleton v. city of Duncan*, 200 Okl. 631, 198 P. 2d 740 (1948), the decision in Tettleton, modified by implication, our holding in the Pottawatomie County case that a taxpayer was without authority to sue previous to the performance of the Bond Commissioner. In Tettleton, an action was brought to restrain the issuance and sale of certain bonds prior to the certification of the Bond Commissioner. The election was challenged on the grounds that the call and the ballots were insufficient to advise the voters of the question presented and that a sufficient number of illegal voters were permitted to vote to change the result of the election. The trial court sustained a demurrer to plaintiff's evidence and we affirmed on appeal. Tettleton clearly establishes that an action may be maintained to challenge the legality of a bond election prior to the performance of the Bond Commissioner.

The Pottawatomie County case was cited with approval in *Rieck v. Town of Longdale*, Okl., 389 P. 2d 482 (1964). In Rieck, the Bond Commissioner was not joined as a party defendant and this Court held:

"Subsequent to the holding of an election at which bonds are voted and previous to the performance by the Bond Commissioner of the duties prescribed by law with reference thereto, the citizen taxpayers' suit in the courts to have such bonds declared illegal because of **the illegality of such election may be abated upon proper motion.**"

Although Rieck cited with approval the Pottawatomie County case, it did not hold that a taxpayer was without

capacity or authority to sue to have bonds declared illegal because of the illegality of the election prior to the action by the Bond Commissioner, as held in the Pottawatomie County case; but held that a taxpayer's suit in the courts to have bonds declared illegal because of the illegality of the election may be abated upon proper motion, where the suit is filed previous to the action of the Bond Commissioner.

Our Court has never had the occasion to consider a case wherein an action was pending in a trial court at the time the Bond Commissioner performed his duties under §13, and one reason for this is: When a municipality submits a request to the Bond Commissioner to determine the legality of a general bond issue, the municipality, through its proper officials, certifies that no litigation is pending questioning or affecting the legality of the bond issue.

The only issue presented in this original action is whether Oklahoma has a well-defined period for bringing challenges to general bond elections within the meaning of City of Phoenix, supra.

Since our decisional law recognizes that an action may be maintained prior to the time the Bond Commissioner performs his duties under §13, supra; and there is no statute prescribing the time in which the Bond Commissioner is required to perform his duties under §13, supra; we can only conclude and hold that Oklahoma does not have a well-defined period for bringing challenges to general obligation bond elections within the meaning of City of Phoenix, supra.

We further hold that the general obligation bond election held by the City of Oklahoma City, Oklahoma, on June 9, 1970, having not been challenged prior to the date of the decision in City of Phoenix, supra, is not open to challenge on the basis of the ruling in City of Phoenix, supra.

Plaintiff's prayer for an injunction is denied.

CONCUR, BERRY, V.C.J., and BLACKBIRD, JACKSON and LAVENDER, JJ. CONCUR SPECIALLY: DAVISON and WILLIAMS, JJ. DISSENT: HODGES and McINERNEY, JJ.

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

BARBARA J. BEAUCHAMP,

Plaintiff,

vs.

No. 44475

THE CITY OF OKLAHOMA CITY, a Municipal Corporation; JAMES H. NORICK, Mayor of the City of Oklahoma City; PATIENCE LATTING, JOHN M. SMITH, GEORGE N. STURM, NELSON E. KELLER, BILL H. BISHOP, BEN FRANKLIN, A. L. DOWELL and ROWE COOK, Members of the City Council,

Defendants.

WILLIAMS, J., CONCURRING SPECIALLY:

I agree with the views expressed in the majority opinion herein this day promulgated of effect that Oklahoma does not have a well-defined period for bring challenges to general obligation bond elections as contemplated in the referenced opinion of the Supreme Court of the United States and that the special election herein involved is not now open to challenge on the basis of that opinion. Moreover, I desire to express my further views as hereinafter appearing.

A state may establish other qualifications than residence for the exercise of the elective franchise, *Carrington v. Rash*, 380 U. S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965). Equal protection of the law does not require identity of treatment; It does require that classification be based on real differences, not wholly arbitrary. *Walters v. City of St. Louis*, 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954). *Settle v. City of Muskogee, Okla.*, 462 P. 2d 642, 646 (1969).

Since 1940, at the latest, our Constitution has been of interpretation as rendering "ineligible to vote on the question of bonded debts by municipalities those qualified voters who do not pay taxes on **real** or **personal** property." (Emphasis

supplied) *Henry v. Oklahoma City, et al.*, 188 Okl. 308, 108 P. 2d 148, 152, (1940).

In my opinion, the first paragraph of the opinion of the majority of the Court in the case of *Phoenix v. Kolodziejski*, _____ U. S. _____, 90 S. Ct. 1990, 26 L. Ed., 2d 523 (1970), distinguishes that case on the facts from our present case. There, the question was stated to be: Does the Federal Constitution permit a State to restrict to **real** property taxpayers, the vote in elections to approve the issuance of general obligation bonds? (Emphasis supplied).

From the facts stated in **Phoenix** and the notes appended thereto a second compelling variance from our facts is set forth. There it is stated that property taxes were to be levied to service the involved indebtedness but in addition, the City was authorized to allocate other revenues for the same purpose and, in fact, on a general obligation debt service requirement of $5, 594, 937.00 for fiscal year 1969-1970, made a payment, typical of those made in recent years, of more than 55% of such general obligation service requirements or to be exact from such other sources paid $3,244,773.00 therof.

Here, the applicable State Constitutional provision requires annual tax levies on **personal** and **real** property in the city, sufficient to meet **all** interest and principal maturities. Of course, a city may pay for permanent capital improvements out of current earnings as distinguished from ad valorem levies. *J. M. Alsip v. City of Chandler, Okl.*, 408 P.2d 512 (1965). However, this was not firmly established until 1965 in **Alsip**, wherein are cited other earlier cases of that effect.

And, while it may be done, it is well known that only in six or eight cities and towns in Oklahoma in the past half century or so have there been sufficient funds from sources other than ad valorem tax revenues to pay any considerable amount of the expenses of municipal government above those categories of expenditures to which they were primarily allocable, viz., the cities of Stillwater, Wynnewood, et al. And, in each of those instances I daresay they were paid with funds produced from waterworks originally built from bond money taxable back to the owners of **real** and **personal** property, if not

paid by revenues from the involved utility.

As to the facts of the present case, everybody knows Oklahoma City has issued millions of dollars in revenue bonds repayable from sewer taxes, water rents and what not to build capital improvements not obtainable from tax revenues within the constitutional debt limits, and had to enact a sales tax to make salary adjustments for its employees. This is not a condemnation of Oklahoma City. To the contrary, it demonstrates that Oklahoma City and its citizens and officials must use all lawful and constitutional sources of revenue available to provide the varied services required of so large a modern, metropolitan, growing city and yet maintain its cash position "in the black".

In copy of the published election proclamation attached to petition filed in the trial court in the case from which the appeal, sister to this case, arose, pursuant to authority vested in Oklahoma City by Article X, Section 27, Oklahoma Constitution, the City specified in the several involved propositions being voted upon that in addition to, that is, on top of all other taxes of all sorts the **personal** and **real** property ad valorem taxpayers were already paying, that those such taxpayers who voted were voting tax liens for different, additional taxes against their such respective properties.

In the election with which we are here concerned, it is my belief that the election authorities have not arbitrarily discriminated against any one for the following re-emphasized reasons, to-wit:

1. In **Phoenix**, Mrs. Kolodziejski was a qualified voter except that she owned no taxable **real** estate. As an owner of taxable **personalty**, in Oklahoma City at the involved election she would have been welcomed at the polls.

2. Oklahoma City must and perforce will pay for the improvements obtained with the proceeds of this bond issue from revenues received **only** from ad valorem taxes on **real** and **personal** property.

I respectfully concur specially.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Barbara J. Beauchamp,
Plaintiff

vs.

No. 44,475

City of Oklahoma City, a Municipal Corporation; James H. Norick, Mayor of the City of Oklahoma City; Patience Latting, John M. Smith, George N. Sturm, Nelson E. Keller, Bill H. Bishop, Ben Franklin, A.L. Dowell and Rowe Cook, Members of the City Council,
Defendants

DAVISON, J., CONCURRING SPECIALLY.

In concurring specially I desire to express my views for denying plaintiff's prayer for the injunction.

In *City of Phoenix v. Kolodziejski*, _____U. S._____, 90 S. Ct. 1990, 26 L. Ed 2d 523, the question presented was: Does the Federal Constitution permit a State to restrict to **real property taxpayers** the vote in elections to approve the issuance of general obligation bonds? The court, with three Justices dissenting and one Justice abstaining, extended the principles in the Kramer and Cipriano cases and held that the Arizona Constitution and statutes, as applied to exclude non-owners of real property from voting in elections to approve issuance of general obligation bonds, violated the Federal Constitution. In making the determination the majority of the court concluded that "The differences between the interests of real property owners and the interests of non property owners are not sufficiently substantial to justify excluding the latter from the franchise."

I believe and conclude that there are significant and controlling facts that distinguish the situation in the instant case from that in the Phoenix case. In the present case the

constitutional provision (Art. 10, §27) permits **personal property taxpayers** and **real property taxpayers** to vote. A tax is required to be levied upon their personal and real property to pay the bonds. In Arizona voting was restricted to real property taxpayers. In the present case §27 permits the property taxpaying voters to incur indebtedness and encumber their property **without limit**. In Phoenix the question as to whether or not a state could constitutionally confer upon all of its electors exclusive and absolute power to incur general bonded indebtedness **without limit** at the expense of personal and real property owners was not presented or considered. The importance and significance of this distinguishing feature of our Constitution was fully presented and discussed in *Settle v. City of Muskogee*, 462 P. 2d 642.

It is my opinion that the Phoenix decision is not controlling in the present situation.

I am authorized to state that Mr. Justice Williams concurs in the above views.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Barbara J. Beauchamp,

Plaintiff,

vs. No. 44,475

City of Oklahoma City, a Municipal Corporation; James H. Norick, Mayor of the City of Oklahoma City; Patience Latting, John M. Smith, George N. Sturm, Nelson E. Keller, Bill H. Bishop, Ben Franklin, A. L. Dowell and Rowe Cook Members of the City Council,

Defendants.

McINERNEY, J.: (DISSENTING)

I dissent from the decision of the majority to accept jurisdiction in this original proceeding. I would deny the application to accept jurisdiction and leave Plaintiff to her remedy in the District Court.

A delay in the early determination of the question of public importance would not necessarily result. Our decision in Supreme Court case No. 44,478, *Martin et al. v. City of Oklahoma City*, decided this date, is an **appeal** from the District Court by two protestants to the identical bond election challenged in this original proceeding. The absence of a record in a true adversary proceeding coupled with the stipulation herein precludes inquiry into whether the status of Barbara J. Beauchamp as an unqualified voter in general obligation bond elections is self-imposed, 68 O. S. Supp. 1965, § § 2431, 24201, or legally imposed, Art. 10, § 27, Oklahoma Constitution. If the former, Plaintiff's standing to institute this action is questionable.

There are only two reasons why the U. S. Supreme Court

has held exclusion of non-property taxpayers unconstitutional. One is that it discriminates against the impoverished. See *Harper v. Virginia State Board of Elections*, 383 U. S. 663, 16 L. Ed 2d 169, 86 S. Ct. 1079 (1966). The other is that such an exclusion is irrational as applied to persons who **indirectly** pay such taxes through the form of higher rents to their landlords, and such. *City of Phoenix v. Kolodziejski*, _____ U. S. _____, 90 S. Ct. 1990; 26 L. Ed 2d 523 (1970).

Although the Plaintiff externally appears to come within the **results** of the foregoing cases, she fails to allege or prove that she comes within the **reasons** therefor. First, Plaintiff makes no plea of personal poverty. **Harper**, supra. Second, while Plaintiff correctly states that the U. S. Supreme Court has sustained the indirect payment of property taxes theory, **Phoenix**, supra, she totally ignores the fact that payment of **personal** taxes would by itself have been sufficient to entitle her to vote at the challenged election, and by the very nature of the **personal** tax there can be no "vicarious" or "indirect" payment of the tax (in the sense of property taxes paid by landlords being passed on their tenants in the form of increased rents, and the like).

It would appear, therefore, that Plaintiff has not based her failure to pay a **personal** tax (and hence her exclusion from the challenged election) upon the circumstance of grounds condemned by the U. S. Supreme Court as impermissibly discriminatory or irrational, i.e., poverty, or vicarious actual payment.

In the absence of any **factual** showing or adversary record of the Plaintiff's standing, I am of the opinion that no adequate actual "case or controversy" has been properly demonstrated sufficent to invoke and sustain this Court's jurisdiction; and I would, therefore, deny the application to assume jurisdiction.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Georgann Martin
Max Troub

Plaintiffs in Error

vs. NO. 44478

The City of Oklahoma City

Defendant in Error

SYLLABUS

1. The Legislature may make registration a prerequisite to the right to vote in order to prevent fraud and to protect the purity of the ballot. Art. 3, § 6, Oklahoma Constitution.

2. One who attempts to sue in behalf of members of a class must be a member of the class he purports to represent.

*****

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA
Hon. Jack R. Parr, Judge

*****

Georgann Martin and Max Troub sought to enjoin issuance of bonds voted pursuant to Art. 10, § 27, Oklahoma Constitution. District Court sustained City's motion in abatement because Martin and Troub were not registered voters as required by 11 O. S. 1961, § 65.

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AFFIRMED

*****

Bonham, Brogden and Clifton
Oklahoma City, Oklahoma — For Plaintiff in Error Max Troub

David M. Harbour
Oklahoma City, Oklahoma — For Plaintiff in Error Georgann Martin

Roy H. Semtner
Municipal Counselor

Walter M. Powell
Assistant Municipal Counselor

Roland Tague
Assistant Municipal Counselor — For Defendants in Error

DAVISON, J.

This is an appeal by Max Troub (plaintiff below) and Georgann Martin (intervenor below) from an order of the District Court of Oklahoma County sustaining the motion in abatement of the City of Oklahoma City (defendant below) and dismissing plaintiff's action. We will refer to the parties by their trial court designation or by name.

Plaintiff's petition, in which intervenor joined, alleged that they were residents of the City; that they were not property taxpayers; that the action was brought in their behalf and in behalf of all persons resident within the City; and sought to enjoin the issuance and delivery of certain general obligation bonds approved at an election held within the City on June 9, 1970, pursuant to Art. 10, § 27, of the Oklahoma Constitution. The election and bonds, and the alleged grounds for their invalidity, and the relief sought, are the same as those described and set forth in the original action in this court, numbered 44476, styled *Beauchamp v. City of Oklahoma City, et al.*, this

day decided and appearing in _____ P. 2d _____. In the Beauchamp case we upheld the validity of the election and bonds and refused to issue an injunction. Therefore, if this court were to determine that the trial court erred in sustaining the motion in abatement and dismissing the cause of action, and plaintiffs in error did have standing to prosecute the suit, then the alleged grounds for the alleged invalidity of the general bond election and the relief sought by plaintiffs in error, being the same as those set forth in the Beauchamp case, supra, are considered and disposed of in the Beauchamp case, supra.

In the present case the plaintiff and intervenor did not allege, and in fact admit, that they are not registered voters in the City. The trial court sustained defendant's motion in abatement on the ground that plaintiff and intervenor were not real parties in interest and were not qualified to represent the class of registered voters.

Art. 10, §27, Oklahoma Constitution, restricted voting in the election to qualified property tax paying voters in the City.

Art. 3, §6 of the Oklahoma Constitution, provides that the Legislature may by law provide for the registration of electors in any city, and when it is so provided, no person shall vote at any election unless he shall have registered.

Title 11 O. S. 1961, §65, provides that a "qualified taxpaying voter" of any city as used in §27 of Art. 10, is defined to be a qualified elector under the Constitution and laws of Oklahoma.

In *Love v. State Election Board*, 197 Okl. 157, 170 P. 2d 193, 197, we held that under Art. 3, §6, the Legislature may make registration a prerequisite to the right to vote in order to prevent fraud and to protect the purity of the ballot.

And in *Loftis v. School Dist. No. 52; of Beckham County*, 144 Okl. 281, 290 P. 1101, we said that the matter of requiring registration to vote was left to the discretion of the Legislature, which discretion would not be disturbed unless its acts were so arbitrary and capricious as to offend some provision of the Constitutions of Oklahoma or of the United States.

It is our conclusion that the Legislature legally and validly required registration as a prerequisite to voting in the bond

election.

Under these circumstances we must conclude that plaintiff and intervenor were primarily not qualified to vote and consequently were not real parties in interest. They were not members of the class of registered voters and could not maintain a class action in behalf of persons who were registered as voters but disqualified because they were not property tax payers.

In *Hobbs v. Policy Jury of Morehouse Parish*, 49 Federal Rules Decisions 176 (W.D. La. 1970), the situation was like that in the present case. A party, who was not a registered voter, brought a would-be class action to enjoin issuance of bonds approved at an election in which only "property taxpayers" had the right to vote. The court said that it was axiomatic that one who attempts to sue in behalf of members of a class must be a member of the class he purports to represent, and that the plaintiff, being neither a registered voter nor a property owner, was not a real party in interest and had no standing to prosecute the suit.

The trial court did not err in sustaining the motion in abatement and dismissing the action.

ALL JUSTICES CONCUR.